

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARLOS RIOS,

Plaintiff,

v.

DANIEL PARAMO, et al.,

Defendants.

Case No.: 14-cv-01073-WQH (DHB)

ORDER:

**(1) DENYING MOTION FOR
DEFAULT JUDGMENT (ECF NO.
89);**

**(2) DENYING MOTION FOR
ORDER RE: SERVICE (ECF NO. 95);
AND**

**(3) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
WITHOUT PREJUDICE (ECF NO.
97)**

On April 18, 2016, Plaintiff filed a Motion for Default Judgment. (ECF No. 89.) On June 29, 2016, Plaintiff filed a Motion Regarding Service. (ECF No. 95.) On July 1, 2016, Plaintiff filed a Motion for Appointment of Counsel. (ECF No. 97.) Having read and considered the moving papers, for the reasons set forth below, the Court **DENIES** Plaintiff's Motion for Default Judgment; **DENIES** Plaintiff's Motion for Order Regarding Service; and **DENIES** Plaintiff's Motion for Appointment of Counsel without prejudice.

1 **I. BACKGROUND**

2 Plaintiff, a state prisoner incarcerated at the R.J. Donovan Correctional Facility
3 (“RJD”), commenced this action on April 28, 2014 by filing a Complaint and motion for
4 leave to proceed *in forma pauperis*. (ECF Nos. 1, 2.) On August 14, 2014, the Honorable
5 William Q. Hayes granted Plaintiff’s motion for leave to proceed *in forma pauperis* and,
6 following an initial screening of the Complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and
7 1915A(b), directed the U.S. Marshal to serve the Complaint on Plaintiff’s behalf. (ECF
8 No. 5.)

9 Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction
10 on October 8, 2014. (ECF No. 20.) Defendants filed a Motion for Partial Summary
11 Judgment on November 24, 2014, pursuant to Federal Rule of Civil Procedure 56, arguing
12 Plaintiff failed to exhaust all of his administrative remedies prior to filing suit. (ECF No.
13 34.) On the same date, Defendants also filed a Motion to Dismiss Plaintiff’s Complaint,
14 pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 35.) On September 1,
15 2015, Judge Hayes granted in part and denied in part Defendants’ Motion for Partial
16 Summary Judgment, granted in part and denied in part Defendants’ Motion to Dismiss, and
17 denied Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction.
18 (ECF No. 63.)

19 On October 20, 2015, Plaintiff filed his First Amended Complaint (“FAC”). (ECF
20 No. 64.) In the FAC, Plaintiff brings claims against thirteen staff members at RJD, alleging
21 they engaged in an ongoing conspiracy to threaten and harass him, in violation of his state
22 and federal constitutional rights and privileges, in retaliation for Plaintiff having filed a
23 previous civil rights lawsuit in this district and prison grievances. (*See id.*) Plaintiff asserts
24 federal legal claims under the First, Fifth, and Fourteenth Amendments, in addition to a
25 claim under the Americans with Disabilities Act (“ADA”). (*Id.* at ¶¶ 54-59.) Plaintiff
26 seeks money damages and declaratory and injunctive relief. (*Id.* at pp. 28-30.)

27 On January 15, 2016, Defendants filed a Motion for Partial Summary Judgment,
28 pursuant to Rule 56, again arguing Plaintiff failed to exhaust all of his administrative

remedies prior to filing suit (ECF No. 74), and a Motion to Dismiss the FAC pursuant to Rule 12(b)(6) (ECF No. 73). The Court issued a Report and Recommendation to Judge Hayes on both motions on July 15, 2016. (ECF No. 98.) This Report and Recommendation and related objections are currently pending before Judge Hayes.

II. ANALYSIS

A. Motion for Default Judgment

On April 18, 2016, Plaintiff filed a Motion for Default Judgment pursuant to Federal Rule of Civil Procedure 55(a) and (b). (ECF No. 89.) Plaintiff requests that the Court enter default due to Defendants' failure to plead or otherwise defend, pursuant to Federal Rules of Civil Procedure 8(d), 11(c), and 12(a)(1), (a)(2), (b), and (f). (*Id.* at 1.)

The entry of default under Rule 55 of the Federal Rules of Civil Procedure is proper “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.” Fed. R. Civ. P. 55(a). Under Rule 12, Defendants timely served a responsive pleading to Plaintiff’s FAC. *See* Fed. R. Civ. P. 12; *see also* ECF No. 71. Accordingly, entry of default is improper.

Although titled a Motion for Default Judgment, Plaintiff also seeks to strike Defendants’ replies in support of their Motion for Partial Summary Judgment and Motion to Dismiss the FAC as untimely, as well as sanctions under Rule 11. However, Defendants’ replies were timely filed. (*See* ECF Nos. 75, 85, 86.) The replies were due no later than March 15, 2016, and were filed on the docket on March 11, 2016, with Certificates of Service indicating they were “caused to be mailed in the Office of the Attorney General’s internal mail system” to Plaintiff on that date. (*See id.*) To the extent Plaintiff received the replies later than March 15, 2016, he suffered no prejudice as no response to the replies was permitted. Accordingly, the Court declines to strike the replies. *See Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1145-46 (C.D. Cal. 2015) (declining to strike late filed replies absent evidence of actual prejudice); Civ. L.R. 5.2. Because the filings were timely, and Plaintiff does not assert any other grounds for sanctions under Rule 11(c), the Court finds sanctions are unwarranted.

1 For the foregoing reasons, Plaintiff's Motion for Default Judgment is **DENIED**.

2 **B. Motion For Order Regarding Service**

3 On June 29, 2016, Plaintiff filed a Motion requesting an order instructing the Clerk
4 to serve any and all further orders or judgments with a Proof of Service and via U.S.
5 Certified First Class Mail with return receipt. (ECF No. 95.) Plaintiff argues that
6 Defendants are engaged in an ongoing conspiracy to obstruct Plaintiff's access to the
7 courts, and that Defendant Paramo and his subordinates have taken adverse actions against
8 Plaintiff in other cases which have resulted in irreparable injury. (*Id.* at pp. 1-2.) Plaintiff
9 contends that irreparable injury is likely in this case absent a court order. (*Id.* at 2.)

10 Upon review of the Motion and docket, the Court finds Plaintiff has not
11 demonstrated that irreparable injury is likely to result in this case absent a Court order
12 instructing special service. There is no indication that Plaintiff has failed to receive any
13 Court order or other filing served in this case.¹ Moreover, in the case Plaintiff cites as an
14 example of irreparable injury, *Rios v. Paramo*, Case No. 15-cv-01331-BAS (RBB) (S.D.
15 Cal.) ("Habeas Case"), any alleged injury was reparable. (*See* Habeas Case, ECF Nos. 31,
16 32.) Accordingly, the Court **DENIES** Plaintiff's preemptive Motion requesting an order
17 for special service.

18 **C. Motion to Appoint Counsel**

19 On July 7, 2016, Plaintiff filed a Motion Requesting the Appointment of Counsel.
20 (ECF No. 97.) Plaintiff, who is proceeding *pro se* and *in forma pauperis*, argues that
21 appointment is necessary for the following reasons: (1) he is unable to afford counsel; (2)
22 the issues involved in the case are complex; (3) his ability to investigate the facts, conduct
23 discovery, and cross-examine witnesses is limited; (4) his case has merit; (5) his ability to
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26 ¹ This is in contrast to another case cited by Plaintiff, *Rios v. Paramo*, Case No.
27 13-cv-02455-WQH (JMA) (S.D. Cal.) ("*Rios II*"), in which Plaintiff claimed he had not
28 received a specific court order. (*See Rios II*, ECF Nos. 42, 46.) The court therefore
instructed that particular order, and the order granting the request, be sent via U.S. Certified
First Class Mail with return receipt. (*Id.* at ECF No. 46.)

1 understand English is extremely limited and he lacks education; (6) he has a mental illness
2 and learning disabilities that would make it difficult for him to represent himself; and (7)
3 he has limited access to the law library as an Extended Outpatient Program inmate. (*Id.*)
4 Plaintiff attaches to his Motion a General Chrono placing him on the institution's Learning
5 Disabled list due to a reading disability, psychiatry notes, and prior requests for assistance
6 of counsel. (*Id.* at Exh. 1.)

7 Generally, a person has no right to counsel in civil actions. *Palmer v. Valdez*, 560
8 F.3d 965, 970 (9th Cir. 2009). Districts courts have discretion pursuant to 28 U.S.C. §
9 1915(e)(1), to "request" that an attorney represent indigent civil litigants upon a showing
10 of exceptional circumstances. *Id.*; *see also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir.
11 1991). "When determining whether 'exceptional circumstances' exist, a court must
12 consider 'the likelihood of success on the merits as well as the ability of the petitioner to
13 articulate his claims *pro se* in light of the complexity of the legal issues involved.'" *Id.*
14 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). "Neither of these
15 considerations is dispositive and instead must be viewed together." *Id.* (citing *Wilborn v.*
16 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

17 Plaintiff has litigated this case for over two years without assistance of counsel. In
18 that time, Plaintiff has demonstrated a more than sufficient ability to articulate his claims
19 and understand the arguments, as demonstrated by his oppositions and objections to
20 Defendants' motions to dismiss and motions for partial summary judgment. (*See* ECF No.
21 41, 46, 57, 62, 82, 83, 100.) Although the legal issues in this case are not complex, the
22 number of defendants and claims make prosecuting the case more complicated. However,
23 Plaintiff's filings demonstrate an ability to distinguish between the defendants and to apply
24 relevant law to a variety of facts. Moreover, the need for discovery to develop the facts
25 does not automatically qualify the issues in the case as complex. *See Wilborn*, 789 F.2d at
26 1331.

27 While the Court acknowledges that Plaintiff may suffer from mental illness, Plaintiff
28 has not provided the Court with any evidence that his mental illness is causing a current

1 inability to understand court orders or sufficiently articulate his claims, or that his status as
 2 an Extended Outpatient Program inmate is preventing him from filing timely motions and
 3 responses. Further, Plaintiff has not demonstrated a likelihood of success on the merits.
 4 Although some of his claims may be exhausted and sufficiently pleaded, Plaintiff has not
 5 yet survived a motion for summary judgment on the merits. *See Garcia v. Smith*, No.
 6 10cv1187 AJB(RBB), 2012 WL 2499003, at *4 (S.D. Cal. June 27, 2012) (denying motion
 7 to appoint counsel, finding that although three of the plaintiff's claims survived a motion
 8 to dismiss, "it is too early to determine the likelihood of success on the merits," and
 9 "[w]ithout more, it is not certain whether any of [the plaintiff's] causes of action will
 10 survive summary judgment"). Thus, Plaintiff has not demonstrated the "exceptional
 11 circumstances" required for the Court to appoint counsel.

12 In light of Plaintiff's demonstrated ability to articulate his claims and failure to
 13 demonstrate a likelihood of success on the merits at this stage, Plaintiff's Motion for the
 14 Appointment of Counsel is **DENIED** without prejudice.

15 **III. CONCLUSION**

16 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion for Default
 17 Judgment (ECF No. 89); **DENIES** Plaintiff's Motion for Order Regarding Service (ECF
 18 No. 95); and **DENIES** Plaintiff's Motion for Appointment of Counsel without prejudice
 19 (ECF No. 97).

20 IT IS SO ORDERED.

21 Dated: August 11, 2016



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 23 DAVID H. BARTICK
 24 United States Magistrate Judge
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